No. 72-1328

In the Supreme Court of the United States

OCTOBER TERM, 1973

UNITED STATES OF AMERICA, PETITIONER

v.

IRVING KAHN AND MINNIE KAHN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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INDEX

318-069—73——1

CITATIONS

Cases:

Constitution and statutes:

Miscellaneous:

Constitution and statutes:

Constitution of the United States, Fourth ..... passim

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 471 F. 2d 191. The opinion of the district court (Pet. App. C) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1972 (A. 39). A petition for rehearing was denied on January 29, 1973 (Pet. App. B). On February 20, 1973, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including March 30, 1973, and the petition was filed on that date. It was granted on May 14, 1973. The jurisdiction of this Court rest on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether Title III of the Omnibus Crime Control and Safe Streets Act of 1968 prohibits the interception of the incriminating conversations of a known user of a specifically described telephone, who was not known to be engaged in the criminal activities under investigation, except upon a showing that such user's complicity in the criminal activities could not have been discovered before the interception was authorized.

2. Whether, under an order authorizing the interception of communications "of [the person being investigated] and others as yet unknown," conversations on the identified telephone involving a known user of the telephone whose complicity in the offense was not known may be admitted into evidence against such user and against the person named in the order.

STATUTE INVOLVED

18 U.S.C. 2518 provides in pertinent part:

> (1) Each application for an order authorizing or approving the interception of a wire or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction and shall state the applicant's authority to make such application. Each application shall include the following information:
>
> * * * * *
>
> (b) a full and complete statement of the facts and circumstances relied upon by the applicant, to justify his belief that an order should be issued, including (i) details as to the

particular offense that has been, is being, or is about to be committed, (ii) a particular description of the nature and location of the facilities from which or the place where the communication is to be intercepted, (iii) a particular description of the type of communications sought to be intercepted, (iv) the identity of the person, if known, committing the offense and whose communications are to be intercepted;

* * * * *

(3) Upon such application the judge may enter an ex parte order, as requested or as modified, authorizing or approving interception of wire or oral communications within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that—

(a) there is probable cause for belief that an individual is committing, has committed, or is about to commit a particular offense enumerated in section 2516 of this chapter;

(b) there is probable cause for belief that particular communications concerning that offense will be obtained through such interception;

(c) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried or to be too dangerous;

(d) there is probable cause for belief that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such of-

fense, or are leased to, listed in the name of, or commonly used by such person.

(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

(a) the identity of the person, if known, whose communications are to be intercepted;

(b) the nature and location of the communications facilities as to which, or the place where, authority to intercept is granted;

(c) a particular description of the type of communication sought to be intercepted, and a statement of the particular offense to which it relates;

(d) the identity of the agency authorized to intercept the communications, and of the person authorizing the application; and

(e) the period of time during which such interception is authorized, including a statement as to whether or not the interception shall automatically terminate when the described communication has been first obtained.

STATEMENT

1. On March 20, 1970, the government submitted an application for an order authorizing the interception of communications over certain telephones pursuant to the provisions of 18 U.S.C. 2510–2520 (Title III, Omnibus Crime Control and Safe Streets Act of 1968). The affidavit accompanying the application submitted to the issuing judge contained extensive, detailed information from three reliable sources engaged in gambling activities indicating that Irving Kahn was a bookmaker operating from his residence

and using his home telephone to conduct his business (A. 10–11, 14–16). This information was corroborated by telephone company records showing calls to and from a known gambling figure in another state (A. 12–15, 17–18).[1] The affidavit also noted that all of the informants had stated that they would refuse to testify, that telephone records are insufficient to convict, and that physical surveillance and seizure of any records of Irving Kahn would be unlikely to furnish useful evidence (A. 18–19). The application therefore concluded that "normal investigative procedures reasonably appear to be unlikely to succeed" (A. 4).

Based on this application, Judge William J. Campbell, of the United States District Court for the Northern District of Illinois, entered an order pursuant to 18 U.S.C. 2518 authorizing the interception of wire communications (A. 21–23). Judge Campbell made the specific findings required by 18 U.S.C. 2518 (3), including the following findings (A. 22):

> (c) [N]ormal investigative procedures reasonably appear to be unlikely to succeed and are too dangerous to be used.
>
> (d) [T]here is probable cause to believe that the two telephones, both located at 9126 Four Winds Way, Skokie, Illinois, a private residence, and subscribed to by Irving Kahn, and

[1] On the basis of this information the application stated (A. 5):

"* * * there is probable cause to believe that telephone numbers 675-9125 and 675-9126, located at 9126 Four Winds Way, Skokie, Ill., a private residence and subscribed to by Irving Kahn, have been used and are being used by Irving Kahn and unknown others, in connection with the commission of the above-described [gambling] offenses."

> carrying telephone numbers 675–9125 and 675–9126, respectively, have been and are being used by Irving Kahn and others as yet unknown in connection with the commission of the above described offenses [use of interstate telephone communications facilities for the transmission of bets and betting information and in aid of a racketeering enterprise in violation of 18 U.S.C. 1084 and 1952, and conspiracy to commit such offenses in violation of 18 U.S.C. 371].

The order authorized special agents of the F.B.I. to (A. 22–23):

> [I]ntercept wire communications of Irving Kahn and others as yet unknown concerning the above described offenses to and from two telephones, subscribed to by Irving Kahn, both located at 9126 Four Winds Way, Skokie, Illinois, a private residence, and carrying telephone numbers 675–9125 and 675–9126, respectively.

The order further provided that status reports were to be filed with the issuing judge on the fifth and tenth days following the date of the order, showing what progress had been made toward achievement of the objective of the order and describing the need for continued interception. Irving Kahn's wife Minnie was not mentioned in the application or in the resulting order.

The first status report, filed with Judge Campbell on March 25, 1970 (A. 26–28), indicated that the interception had been terminated because the objective had been attained. It gave a summary of the information obtained from the interceptions, stating in part that on March 21 Irving Kahn made two telephone calls from Arizona to his wife in Chicago and

discussed gambling wins and losses. On the same date, Mrs. Kahn made two telephone calls from the intercepted telephones to a known gambling figure and discussed numbers and amounts of bets placed and the identification, by code, of the bettors.

2. Both Irving and Minnie Kahn were subsequently charged with using a facility in interstate commerce to promote, manage, and facilitate an illegal gambling business in violation of 18 U.S.C. 1952 (A. 29). The government notified them that it intended to introduce in evidence telephone conversations which had been intercepted pursuant to the court order. The Kahns filed motions to suppress the intercepted conversations (A. 30, 31–38). After a hearing, the district court entered an order suppressing any intercepted conversations between Irving and Minnie Kahn as being within the "marital privilege." In addition, all other conversations in which Minnie Kahn participated were also suppressed as being outside of the scope of Judge Campbell's order (Pet. App. C).

The government appealed, and on October 31, 1972, a divided panel of the court of appeals affirmed that part of the district court's order suppressing all conversations of Minnie Kahn but reversed that part of the order based on marital privilege (Pet. App. A).[2]

The majority, in an opinion by Judge Kiley, held that, under the district court's order, there were two require-

[2] Judge Knoch concurred in the result but would also have held the marital privilege applicable. The dissenting judge agreed that the marital privilege was inapplicable but disagreed with the holding that the conversations of Mrs. Kahn were not within the scope of the order of interception; he would have reversed the suppression order.

ments which all intercepted conversations had to satisfy before they could be admitted into evidence (Pet. App. A, p. 9a):

> 1) [T]hat Irving Kahn be a party to the conversations, and 2) that his conversations intercepted be with "others as yet unknown."

The majority then construed the statutory requirements of 18 U.S.C. 2518(1)(b)(iv) and 2518(4)(a) for identification of the person, if known, whose communications are to be intercepted to exclude from the term "others as yet unknown" used in the order any "persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities" (Pet. App. A, p. 10a). The majority concluded (*id.* at 12a):

> * * * the government has not shown that had it conducted its investigation with the care Congress intended to protect personal privacy, it would not have discovered whether or not Minnie Kahn had implicated herself by her conversations.

The majority further stated that in view of the failure of the government to discover Mrs. Kahn's complicity in the gambling activities or to justify not instituting an investigation into her possible complicity by the time of the application, "the subsequent wiretaps amounted to a virtual general warrant in violation of her Fourth Amendment right". Therefore, the court concluded, no conversations in which she was involved could be admitted into evidence against either Mr. or Mrs. Kahn.

Judge Stevens, in dissent, pointed out that the inter-

cept order in this case authorized interception over the two specified telephones of "communications *of* Irving Kahn and others as yet unknown" and was thus not limited to conversations *between* Kahn and others (*id.* at 16a). He further characterized as inconsistent with the statutory scheme the majority's interpretation of the "if known" language of Section 2518(1)(b)(iv) and Section 2518(4)(a) to include persons who were not in fact "known" to be involved in the criminal enterprise but whom further investigation would have disclosed were probably using the specified telephones for illegal conversations. He also pointed out that "there is nothing in the record to support an inference that the government should have known that Minnie Kahn * * * would use Irving's telephones to transmit gambling information to a third party while he was out of town". (Pet. App. A, pp. 18a–19a). Finally, 2518(3)(c)) had been met, and that the majority had confused that requirement with the identification requirements of Sections 2518(1)(b)(iv) and 2518(4)(a) (Pet. App. A, pp. 19a–20a).[3]

SUMMARY OF ARGUMENT

While the opinion of the court of appeals is not clear, it appears to have based the suppression of all conversations involving Mrs. Kahn on the wording

[3] Respondents petitioned for a writ of certiorari to review that part of the decision below that held that conversations between them were not covered by a marital privilege. The government opposed that petition, and the Court denied certiorari on May 14, 1973, No. 72–1194.

Judge Stevens said that the requirement of exhaustion of normal investigative techniques in advance of application for the wire interception order (Section

of the district court's order authorizing the interception of conversations on the Kahns' household telephone, rather than on the statute itself. However, the opinion also suggests that this conclusion was fortified by the court's view of the statutory requirements and the underlying congressional policies. Viewed either as an interpretation of the order or of the statute, the suppression of the conversations of Mrs. Kahn regarding the Kahns' criminal enterprise was incorrect.

The clear purport of the statute, derived both from its express language and by implication from its structure, is that the application for the order and the order itself need not identify any persons who are not actually known to be engaged in the criminal enterprise. The statute does not expressly require that all known users of the telephone to be intercepted be identified in the authorization order, nor does it require the investigation of such users and the identification of any known user whose complicity in the offense may be discoverable, and it is not desirable to read any such requirement into the statute. Although the court of appeals believed that requiring such investigations would protect against unwarranted invasions of personal privacy, such a requirement would not in fact benefit the subject of the investigation, since, regardless of the outcome of the investigation, the individual conversations could properly be intercepted even under the rationale of the court of appeals. In contrast, reliance upon the means provided in the statute for avoiding unnecessary

intrusions into personal privacy—the minimization of interceptions of innocent conversations—does afford some protection to the privacy of users of the telephone without pointlessly impeding effective law enforcement.

The description of the conversations to be intercepted contained in Judge Campbell's order authorizing the interception is in language identical to that in the application; there is nothing in either the order or the application to suggest that the district judge intended to restrict the authorization more narrowly than the statute requires.

The construction of the order and the statute adopted by the court of appeals was not justified by any need to avoid constitutional problems. The provisions of the statute were designed specifically to comply with the standards for constitutionally valid electronic surveillance identified by this Court in *Berger* v. *New York,* 388 U.S. 41, and *Katz* v. *United States,* 389 U.S. 347. (See S. Rep. No. 1097, 90th Cong., 2d Sess., p. 102.) The Fourth Amendment's requirement of particularity in the warrant was satisfied by the identification, as required by the statute, of the place to be searched (the telephones in the Kahn residence) and the things to be seized (the conversations relating to the described gambling offenses). In addition, the issuing judge found probable cause for issuance of the warrant. The Fourth Amendment does not require that the warrant identify, nor show probable cause with respect to, every known occupant of an area to be searched. Neither does it prohibit the seizure of

things of the kind identified in the warrant which belong to such occupants.

Since the order authorized the interception of conversations of Irving Kahn and of persons unknown relating to the described gambling activities, and since the complicity of Mrs. Kahn was unknown at the time the order issued, the interception of her incriminating conversations was authorized by the order. These conversations should not have been suppressed. Certainly, even if these conversations could not properly be used against Mrs. Kahn, they were admissible against Mr. Kahn, whose interests were in no way injured by the failure to investigate Mrs. Kahn and to name her in the order.

ARGUMENT

INTERCEPTION OF THE CONVERSATIONS OF MRS. KAHN PURSUANT TO COURT AUTHORIZATION OF SURVEILLANCE OF THE KAHNS' TELEPHONES TO OBTAIN EVIDENCE RELATING TO AN ILLEGAL GAMBLING OPERATION WAS LAWFUL.

A. THE LANGUAGE AND STRUCTURE OF THE STATUTE SHOW THAT ONLY PERSONS ACTUALLY KNOWN TO BE ENGAGED IN THE CRIMINAL ENTERPRISE UNDER INVESTIGATION NEED BE NAMED IN THE INTERCEPT APPLICATION AND AUTHORIZATION

The court order authorizing the interception in this case referred to conversations of Irving Kahn and "others as yet unknown." Recognizing the propriety of intercepting conversations of "unknown" persons, the court of appeals began its analysis by seeking to determine whether Mrs. Kahn was "unknown" within the meaning of the order (*i.e.*, since the order was predicated on the statute, whether she fell in the category

of "known" persons as the term is there used). The court posited two respects in which a person could be "known"—either as a user of the telephone or as a participant in the criminal enterprise (Pet. App. A, p. 9a). It is undisputed that the investigating law enforcement officials knew Mrs. Kahn was a user of the phone but did not know, prior to overhearing her conversations, of her complicity in the gambling operation.

Without squarely answering the question it had thus posed, the court of appeals concluded that known users of the phone should be subjected to thorough criminal investigation in an effort to ascertain whether they might in fact be implicated in the criminal activities, and that failure to do so rendered the interception of their conversations unlawful. Thus, the court resolved the question to the extent of rejecting the government's position that persons not actually known to be criminally implicated simply need not, under the statute or the order, be named.

1. Analysis of the statute, however, demonstrates the correctness of the government's interpretation. Section 2518(1) sets out the requirements for the information to be included in the application for an order authorizing interception of wire communications. The sole requirement relating to the identification of persons whose communications are to be intercepted is contained in Subsection (b)(iv) of that section, which provides that the application should include "the identity of the person, if known, *committing the offense* and whose communications are to be intercepted" (emphasis supplied). Manifestly, the identification require-

ment imposed by Congress relates to knowledge of probable criminal complicity rather than simply knowledge of use of the subject telephone,[4] and the fact that the government knew that Mrs. Kahn and the two Kahn children were users of the phone is of no relevance.[5] Indeed, the statute requires the identification of a person only "if known." Thus, when there is probable cause to believe that a particular telephone is used to commit the offense but no particular person is identifiable, a wire interception order may properly issue. Persons then identified through the surveillance may be prosecuted and the intercepted conversations used in evidence against them. *A fortiori*, when it is known that the telephone and one named person are involved in the commission of the offense, intercepted conversations of previously unsuspected persons may be used against them.

If Congress had intended that the conversations of known users of the telephone could not be intercepted

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[4] The other provision dealing directly with identification of persons is Section 2518(4)(a), which provides that the order authorizing the interception shall specify "the identity of the person, if known, whose communications are to be intercepted." There is no reason to believe that any different meaning was intended by the omission of the phrase "committing the offense" from this provision; indeed, since the application is the only source of the information contained in the order, Congress could not have intended to impose a broader identification requirement in connection with the latter.

[5] The knowledge that Mrs. Kahn and the children were using the target telephones would not have justified including them in the order without probable cause showing that they were also involved in the criminal activities. See *United States* v. *Tortorello*, No. 72-1957, C.A. 2, decided April 5, 1973, petition for writ of certiorari pending, No. 72-1703.

unless they were named in the order, that limitation could easily have been included in the statute. No such provision was included.[6] Instead, Congress protected the rights of innocent users of the target telephones by providing that interception of conversations not relating to the defined offense be minimized (18 U.S.C. 2518(5)). Thus, the limitation was drawn on the basis of the types of conversations to be intercepted, rather than of the participants in the conversations. The overhearing of innocent conversations, including those of a named user against whom the interception is directed, was to be minimized, but no limitation was placed on the interception of conversations relating to the offense under investigation, even though the participants had not been named in the order.[7]

There is no allegation here that there was a failure to minimize; neither respondent has been injured by

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[6] In fact, Congress failed to adopt an amendment which would have provided that only the conversations of those named in the order could be admitted into evidence (Amendment 735, 114 Cong. Rec. 14718). *A fortiori*, it must have been contemplated that conversations of others could lawfully be overheard.

[7] Since the limitation was drawn in terms of the content of the conversations, it was necessary to provide explicitly that conversations involving crimes other than those identified in the order could be used in evidence (18 U.S.C. 2517(5)). But since there was no limitation based on the participants in the conversation, no such explicit savings provision was necessary concerning the illicit conversations of unnamed users. Indeed, were it necessary to reach the question, Section 2517(5) itself would seem specifically to authorize interception and use of Mrs. Kahn's conversations regardless of the wording of the authorization order, since the conversations in question in fact related to offenses other than Mr. Kahn's gambling enterprise—*i.e.*, her violations of the same statutes (18 U.S.C. 1084 and 1952).

the overhearing of innocent conversation. Therefore, no rights protected by the statute have been violated. Since the complicity of Mrs. Kahn was in fact unknown at the time the application for the order was filed, she was not identified in the order. She was instead a "person unknown", whose conversations concerning the described offense were intercepted under the clear terms of the order. Nothing in the statute prohibited this interception.

2. In effect, the court of appeals read the statutory requirement that the order disclose the "identity of the person, if known, whose communications are to be intercepted" (Section 2518(4)(a)) as if it included all known users of the phone who might have been discovered to be implicated in the offense by a more thorough investigation—*i.e.*, as though the statute read "the identity of all persons known or discoverable."[8] There is no basis for such a reading of the statute, which was carefully drafted by Congress to conform to the constitutional criteria illuminated by the Court in *Berger* v. *New York*, 388 U.S. 41, and *Katz* v. *United States*, 389 U.S. 347. These criteria, while emphasizing the need for particularity in de-

[8] Even if the court of appeals' interpretation were correct, there has been no finding by the district court that Mrs. Kahn's complicity should have been known. This issue was not considered in the district court, and the government has had no opportunity to refute the court of appeals' speculation that the informants relied upon in the affidavit or the gambling figures whose names were revealed by the telephone records might have supplied information about Mrs. Kahn's involvement. Accordingly, in order to be consistent with its own reading of the statute, the court of appeals should at most have remanded the case to the district court for consideration whether the government investigation was reasonable under the circumstances.

scribing the offense under investigation and the location of the search (*i.e.*, the telephones to be intercepted), and stressing the importance of limiting the extent and duration of the interception in accordance with the needs of the investigation, contains no requirement of investigation beyond that necessary to establish probable cause and supply the information mandated by the statute.[9]

Thus, in the context of a conventional search, if there is probable cause to believe that one occupant of an area to be searched is engaged in criminal activity and that specifically described evidence is likely to be found there, a warrant can be obtained under which the premises may be searched and property constituting contraband or evidence of a crime seized; ownership of the property is irrelevant. It has never been held that all known occupants of the premises to be searched must be investigated before the warrant may issue, or that property seized in a properly authorized search may not be used in evidence against those it implicates if they were not named in the warrant or independently investigated.[10] Similarly here, probable cause was shown to believe that the described gambling offenses were being committed by Irving Kahn and that interception of his phones would disclose evidence of such offenses, including the identity of other persons involved therein. A proper order authorizing the search

[9] Thus, while identity of the persons to be overheard need be supplied only "if known," recitation of the other information required by Section 2518(1)(b) to be contained in the application for an order authorizing interception of communications is mandatory.

[10] See discussion at pp. 27–30, *infra*.

of the described phone for evidence of the described offense issued, and the valid interception of that phone disclosed the conversations implicating Mrs. Kahn. This conforms entirely to the requirements imposed by Congress.

3. The court of appeals believed that the statute specifically supported its conclusion that the government must identify all known users whose complicity it allegedly should have known. In particular, it relied upon the requirement of Section 2518(3)(c) for a judicial finding that normal investigative procedures are insufficient (Pet. App. A, p. 12a). That requirement, however, is designed to assure that interception of communications is not resorted to in situations in which traditional investigative techniques would be adequate to uncover and prove the criminal activity. It is not at all concerned, once the necessity for an interception has been shown, with the scope of the investigation of others who may be involved. The investigation of other persons to determine their possible complicity simply has no bearing on the question whether there is a sufficient showing that adequate evidence of the illegal activity cannot be gathered without the interception.[11] Therefore, the requirement of Section 2518(3)(c) is unrelated to the

[11] Here, the application recited the refusal of the informants to testify, the insufficiency of the telephone records to establish guilt, and the probable fruitlessness of a search for gambling records (A. 18–19). This was ample basis for the finding in the order (A. 22) that normal investigative techniques appeared unlikely to succeed.

requirement that known users of the target phone for illicit purposes be identified, and it cannot be transmuted into a requirement for investigation of other persons (whose complicity also could not be established without the interception of communications).[12]

In sum, neither the statute nor conventional search and seizure law supports a reading of the requirement that other persons committing the offense be identified "if known" to include the identification of all users of the phone who allegedly should have been known to be committing the offense.

4. Finally, the court of appeals indicated in dictum that even if, contrary to its conclusion, a complete investigation of Mrs. Kahn would not have disclosed her complicity, and she was therefore a "person unknown" under the terms of that order, evidence of her incriminating conversations might not be useable against her (Pet. App. A, p. 13a).[13] This conclusion was also incorrect. The statute contains no such exclusionary rule. On the contrary, it clearly contemplates that incriminating conversations will be used

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[12] As Judge Stevens, dissenting on this aspect of the case, quite rightly pointed out (Pet App. A, p. 20a):

"Although § 2518(3)(c) imposes a duty on the government to exhaust normal investigative procedures before applying for an intercept order, it seems unlikely that the 'if known' requirement in § 2518(4)(a) was intended to impose either an additional exhaustion requirement or a more severe standard for measuring the government's compliance with the express language of subsection (3)(c). I am therefore persuaded that the majority's interpretation of the 'if known' requirement will merely tend to confuse two quite different statutory purposes."

[13] The court did recognize that in such circumstances—which, we submit, were the ones actually before the court—the evidence could be used against Mr. Kahn.

in evidence against persons not named in the order. Thus, Section 2517(3) provides that all conversations are admissible in evidence if they were "intercepted in accordance with the provisions of this chapter." Section 2518(8)(d) directs the issuing judge to determine when the interests of justice require the service of an inventory identifying the communications of parties not named in the order that have been intercepted.[14] In addition, Section 2510(11) defines an "aggrieved person" (who may move to suppress the contents of an intercepted conversation under Section 2518(10)(a)) as "a person who was a party to any intercepted wire or oral communication or a person against whom the interception was directed." These provisions indicate that the statute contemplates that all incriminating conversations over the described phone may be intercepted and used in evidence, subject to the right of participants in those conversations, whether named in the order or not, to appropriate notice and an opportunity to challenge the use of the evidence on the grounds particularly specified.[15] The provisions would make no sense what-

[14] In successfully urging adoption of an amendment to the post-intercept notice requirement, Senator Hart pointed out (114 Cong. Rec. 14485):

"This title requires notice of wiretapping or eavesdropping to be served only on the persons named in the court order. The communications of many other persons, innocent or otherwise, may also be intercepted. The amendment would give the judge who issued the order discretion to require notice to be served on other parties to intercepted communications even though such parties are not specifically named in the court order."

[15] This approach is consistent with the "plain view doctrine", discussed *infra* at 29–30, which permits the seizure of incriminating items not particularly described in a search warrant when they are come upon in the course of a lawful search.

ever if Congress intended the exclusionary rule envisioned by the court of appeals.

Suppression of logically relevant evidence in a criminal prosecution is a drastic remedy, which is justified only when it serves an overriding public policy, such as the need to deter illegal official conduct violating substantial rights. See *Nardone* v. *United States*, 308 U.S. 338, 340. But there was no illegal official activity here, and consequently there is no public policy justifying application of an exclusionary rule. The incriminating evidence was discovered in the course of a properly authorized interception of the Kahn telephones; no rights of either Mr. or Mrs. Kahn were violated by the overhearing of their conversations which (1) related to the offenses described in the order and (2) were conducted on the target telephones. An ample showing of probable cause was made to justify the intrusion into the Kahns' privacy, and the interception was conducted in conformity with the court's authorization. No valid deterrent objective could be served by application of an exclusionary rule in such circumstances precluding the use of intercepted conversations against persons not named in the order.

B. THE DECISION OF THE COURT OF APPEALS WOULD NOT RESULT IN PROTECTION OF THE PRIVACY OF CITIZENS AS TO WHOM PARTICIPATION IN CRIMINAL ACTIVITIES IS NOT ESTABLISHED AT THE TIME OF APPLICATION FOR AN INTERCEPT AUTHORIZATION

Invoking congressional concern to safeguard the privacy of innocent persons, the court of appeals concluded that it was necessary to limit "tightly" the class of persons "as yet unknown" (whose conversations could be intercepted under the authorization) and to

interpret the statute to require the government to name all "persons whom careful investigation by the government would disclose were probably using the Kahn telephones in conversations for illegal activities" (Pet. App. A, p. 10a). We believe, however, that a meaningful concern for the dual objectives of the statute (protecting the privacy of innocent persons while enhancing the effectiveness of law enforcement in certain areas in which interception of communications is indispensible) mandates precisely the opposite result, since the investigation required by the court of appeals, whatever its outcome, would not prevent interception of the telephone user's conversations.

Let us consider the question first from the standpoint of the salutary proposition that unnecessary governmental intrusions into the personal privacy of innocent persons should be minimized. What the court of appeals has required is a thorough criminal investigation of all known users of telephone lines that are the subject of an application for an intercept order—in this case, an investigation of Mrs. Kahn and the two teenage Kahn children.[19] Such an investigation, while undoubtedly lawful, could hardly further the privacy interests of those subject to it, unless it prevents some other, more substantial governmental involvement in their affairs.

However, in the present case, the subjects of these additional criminal investigations required by the court of appeals would not derive any such benefits therefrom. If the investigation yields evidence of their complicity, their conversations would unquestionably be subject to valid search and seizure under the court of appeals

[19] If a target telephone were in a store or an office, everyone who had ready access to it might have to be investigated.

opinion, simply by naming them in the application and order. If, on the other hand, the investigation failed to disclose evidence of criminal involvement, the individual would then become "unknown" within the order, and the interception of his or her conversations would be similarly validated. In either case the investigation could not lead to any avoidance of interception of the person's conversations.

Accordingly, whether or not the investigation that the court of appeals would require is conducted, any user of a phone subject to an otherwise valid interception order is left with the protection that Congress itself provided to avoid needless intrusions on personal privacy—the minimization requirement of Section 2518(5) applicable to innocent conversations (a requirement that applies to any named targets of the investigation as well as to other users and that is not alleged to have been violated in this case).

Not only does the approach of the court of appeals result in a pointless and unnecessary criminal investigation of citizens who are not known to be participants in the criminal enterprise, but it places serious obstacles—wholly unnecessary for the protection of individual rights—in the way of proper law enforcement activities. In the instant case, a careful investigation of Mr. Kahn's activities had disclosed reliable information that his home telephones were being used in connection with the conduct of an unlawful gambling enterprise (including use of interstate telephone facilities in violation of federal law). In accordance with the carefully drawn requirements of the statute, a full account of the investigation was submitted to a district judge (A.

9–20), who concluded that probable cause was shown to justify issuance of an order authorizing the wire interception. The order, containing time limitations on the interception and other provisions for judicial supervision of its execution, was duly issued. This was clearly sufficient under the statute to justify the interception of conversations over the identified telephone lines.

The imposition of a judicial requirement for further investigation of other users of the telephone—not needed to justify the fundamental intrusion entailed in placing the tap on the phone—diverts law enforcement resources and, in fast-breaking cases, may cause a fatal delay in obtaining intercept authority. It also places law enforcement officers in the dilemma of having to predict what a court may subsequently say about various questions not necessarily having clear and readily ascertainable answers—*e.g.*: What individuals come within the category of "users" of the phone, who must therefore be subject to investigation? How much investigation is sufficient? If there is some suggestion of possible complicity of such an individual, is it proper to name him as a target in the application (running the risk that a court will later hold that there was not probable cause justifying his inclusion), or should his name be omitted (running the risk that the second guess will lead to the opposite conclusion)?

While there may be circumstances in which it is useful or necessary to engage in judicial second-guessing in the evaluation of police conduct, surely it is not desirable in cases such as this, where the intrusion is independently justified under the law and is conducted

in accordance with a most thorough system of judicial supervision at the initial authorization stage and thereafter.

C. THE ORDER AUTHORIZING THE INTERCEPTION IN THIS CASE DID NOT RESTRICT THE INTERCEPTION MORE NARROWLY THAN REQUIRED BY THE STATUTE

Judge Campbell's order authorized the interception of "communications of Irving Kahn and others as yet unknown concerning the above-described offenses to and from two telephones, subscribed to by Irving Kahn" (A. 22). The court of appeals interpreted this language to limit the interceptions to conversations (1) to which Irving Kahn was a party and (2) in which he conversed with "others as yet unknown" (Pet. App. A, p .9a.) [17] Both limitations are incorrect. There is no indication that the issuing judge either intended to, or in fact did, limit the scope of the order more narrowly than required by the statute. Indeed, it is evident that the reference to "others as yet unknown" in the operative section of the order is carried over from the finding of probable cause (A. 21), which is, in turn, derived from the statement in the application (A. 4). All these references are clearly intended to reflect the statutory requirement that persons whose illicit communications are to be intercepted be identified "if known." Thus, there is no more reason to find that the order intended to preclude the interception of Mrs.

[17] Other courts have not interpreted similar language in other orders so narrowly. See *United States* v. *Fiorella*, 468 F.2d 688 (C.A. 2), pending on petition for writ of certiorari, No. 72-863; *United States* v. *Cox*, 462 F.2d 1293 (C.A. 8), pending on petition for writ of certiorari, No. 72-5278; *United States* v. *Cox*, 449 F.2d 679 (C.A. 10), certiorari denied, 406 U.S. 934.

Kahn's conversations, simply because she was a known user of the target telephones, than there is to conclude that the statute requires that result.

It is equally evident, as the dissenting judge noted, that the reference to the "communications of Irving Kahn and others" should not be read as if it referred to conversations *between* Irving Kahn and others (Pet. App. A, pp. 16a–17a). The affidavit disclosed that Irving Kahn regularly used his residence telephones to conduct his illegal gambling business. One of the stated purposes of the interception, contained in Judge Campbell's order itself, was to "reveal the identities of [Irving Kahn's] confederates, their places of operation, and the nature of the conspiracy involved therein" (A. 23). Against this backdrop, it is hard to discern any intent to limit interception to conversations of Irving Kahn himself.[18] Indeed, since Irving Kahn could not communicate except with others, the words "and others" would have been unnecessary unless they referred to communications by others.

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[18] It was obviously likely that other users of the Kahn household telephones might participate in conversations that, whether known or unknown to them, could provide revealing information about the gambling operation. Since Mr. Kahn could hardly be assumed to be invariably at home and available, someone else would be expected on occasion to receive calls relating to the business on those telephones. In any event, conversations which might disclose the identity of other conspirators in the gambling business or other pertinent information might very well occur when someone other than Mr. Kahn was using the telephone. For example, a gambling associate might identify himself by name

D. REFERENCE TO THE GENERAL BODY OF CONSTITUTIONAL PRINCIPLES GOVERNING SEARCHES AND SEIZURES SUPPORTS THE POSITION OF THE GOVERNMENT, NOT THAT OF THE COURT OF APPEALS

Without making it clear whether it was holding that the interception of conversations of unnamed persons, although clearly authorized as a general matter by the statute, is unconstitutional, the court of appeals stated that the failure to investigate Mrs. Kahn's possible complicity in her husband's illegal gambling enterprise made "the subsequent wiretaps * * * a virtual general warrant in violation of her Fourth Amendment right" (Pet. App. A, p. 12a).[19] The court cited no authority for the proposition that a court authorization to intercept communications is a general warrant if it fails to name the persons whose conversations will be overheard, and in fact, so far

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if he wished to leave a message. Under these circumstances, it is unlikely that the judge intended to limit the order to conversations in which Irving Kahn himself participated. Instead, the words used in the order should be given their normal meaning and read as authorizing the interception of conversations both of Irving Kahn and of others, provided they concerned criminal offenses.

[19] Presumably the court did not mean to say that the wiretaps themselves were a general warrant, but that the order, insofar as it was construed to authorize the interception of conversations to which Mrs. Kahn was a party (or perhaps any conversations to which Mr. Kahn was not a party as well), would become an unconstitutional general warrant. The court did not indicate whether it would find the same defect with respect to conversations involving persons "unknown" even under its definition, although it is difficult to see how the "general warrant" analysis could be confined to the conversations of Mrs. Kahn.

as we are aware, all other courts that have considered this question have reached a contrary conclusion. See *United States* v. *Fiorella*, 468 F.2d 688, 691 (C.A. 2), petition for certiorari pending, No. 72–863, and cases there cited.[20]

That we have here no "general warrant" problem is evident from an examination of the language in the Fourth Amendment prohibiting such warrants: "* * * [N]o warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." The two elements of particularity required by the Fourth Amendment are both fully satisfied by the authorization in this case, which identified both the "place to be searched" (the two telephone lines) and the "things to be seized" (conversations relating to an illegal gambling enterprise). Identification of the person or persons whose conversations are to be overheard is not a constitutional requirement.

The error in the court of appeals' approach may be seen by examination of an analogous conventional

[20] See also *United States* v. *Cox*, 449 F.2d. 679, 685–687 (C.A. 10), certiorari denied, 406 U.S. 934; *United States* v. *Cox*, 462 F.2d 1293, 1300–1301 (C.A. 8), petition for certiorari pending, No. 72–5278. In the Tenth Circuit's *Cox* decision, communications in which neither of the parties to the conversation was specifically named in the order were introduced into evidence. The court of appeals upheld the admissibility of those conversations, even though they concerned an offense other than the one specified in the order. In the Eighth Circuit's *Cox* case, the court held (correctly, we submit) that interception of all communications over the designated telephone during the authorized period was proper.

search and seizure. Suppose a warrant had been issued, upon a showing of probable cause, to search the Kahn residence for records of the illegal gambling operation, and the search had produced records in Mrs. Kahn's handwriting. The search and seizure would surely have been fully lawful even had she not been named in the warrant nor independently investigated. Indeed, so long as the place to be searched and the property to be seized had been identified with sufficient particularity and an adequate showing of probable cause underlay the warrant application, the warrant would be constitutionally unimpeachable even if no person against whom the search was directed was named (a problem we do not have here, where Mr. Kahn was specifically identified). See, *e.g.*, *Hanger* v. *United States*, 398 F. 2d 91, 99 (C.A. 8), certiorari denied, 393 U.S. 1119; *Miller* v. *Sigler*, 353 F. 2d 424, 428 (C.A. 8), certiorari denied, 384 U.S. 980; *Dixon* v. *United States*, 211 F. 2d 547, 549 (C.A. 5).

Even were there some principle that the interception of conversations must initially be directed at persons actually named in the intercept authorization, the "plain view" exception to the warrant requirement would justify seizure and use of Mrs. Kahn's conversations under the circumstances of this case. As explained in *Coolidge* v. *New Hampshire*, 403 U.S. 443, 465, the "plain view" doctrine applies to "the situation in which the police have a warrant to search a given area for specified objects, and in the course of the search come across some other article of incriminating character," which is precisely what happened here. It

is justified by the consideration that (*id.* at 467), "* * * given the [lawfulness of] the initial intrusion, the seizure of an object in plain view * * * does not convert the search into a general or exploratory one."[21]

E. EVEN IF THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE AUTHORIZATION WAS DEFECTIVE IN FAILING TO NAME MRS. KAHN, HER CONVERSATIONS SHOULD NOT HAVE BEEN SUPPRESSED FOR USE AGAINST MR. KAHN

Both the district court (Pet. App. C, p. 23a) and the court of appeals (Pet. App. A, p. 14a) apparently suppressed the conversations of Mrs. Kahn completely, without discriminating between the propriety of their use against her and of their use against Mr. Kahn. Even assuming that the court of appeals was correct that the government was not authorized to intercept her conversations, it should have limited the suppression to use against Mrs. Kahn. It is undisputed that the interception of Mr. Kahn's conversations relating to his gambling operation was fully justified under the statute and the intercept authorization. The defect found by the court of appeals related to a matter that was wholly personal to Mrs. Kahn—her right to be

[21] The opinion in *Coolidge* also requires that the evidence be come across inadvertently (403 U.S. at 469–471). While this might raise a problem had Mrs. Kahn's criminal complicity been known in advance and had it been planned to seize her conversations, that was not the case here.

subjected to a criminal investigation before her conversations were intercepted. Since no rights of Mr. Kahn were in any way violated, he should not be accorded standing to seek suppression of the conversations for use against him.

It is true that Section 2518(10)(a) permits any "aggrieved person" to move to suppress the contents of a communication intercepted in violation of the authorization order, and Section 2510(11) defines an "aggrieved person" to include "a person against whom the interception was directed." These provisions should not, however, be construed to confer broad standing upon persons to press grievances that are uniquely personal to others, when the manifest purpose of the provisions is simply to confer standing upon the target of an interception to raise general objections regarding the manner in which an interception authorization was procured or executed.[22]

[22] The point can be readily understood by means of an analogy to a conventional search and seizure situation. If officers having a valid warrant for the arrest of Mr. Kahn had entered his house lawfully to execute the warrant, but while doing so had unlawfully arrested Mrs. Kahn, searched her, and discovered evidence incriminating both, such evidence would be admissible against him, notwithstanding the fact that the unlawful conduct took place inside his house, since the illegality would not relate to the entry into the premises, but to the violation of a right entirely personal to her.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed to the extent that it affirmed the suppression of conversations over the target phone concerning the offenses described in the order.

Respectfully submitted.

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Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR RESPONDENTS IRVING KAHN AND MINNIE KAHN

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INDEX

TABLE OF AUTHORITIES

Cases

Other Authorities

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STATEMENT OF THE CASE

The respondents accept petitioner's statement.

SUMMARY OF ARGUMENT

Any invasion of one's security must be clearly and unequivocally authorized by the courts in conformance with the Constitution or the laws of the United States. The government's argument demonstrates that the intrusion on Minnie Kahn's conversations lacks any authorization.

Any authorization to intrude upon privacy affords only of rigorously confined interpretation. The government's argument depends upon the order of authorization including intrusion it does expressly exclude, and expanding the order to encompass whatever the statute does not expressly forbid, to the end that the enforcement officer may interpret his authority in a manner most amenable to his convenience.

The submission of the government that the protection of the right of security extends only to the innocent subverts and erodes the concept of liberty, and ignores the constant admonitions of this court against popular ends justifying illegal means.

The propriety of an intrusion is judged at its inception, not by an evaluation of the fruits.

A precise warrant circumscribes the ambit of the intrusion. Exceeding the express bounds is never justified by expediency, nor what the magistrate may have intended. Because the officer exceeded and interpreted, the Court of Appeals rightly ruled the authorization was executed as though it were a constitutionally impermissible general warrant.

Further, when the law requires the exhaustion of "normal investigative procedures" or apprehension of danger in pursuing them, the prerequisite is not satisfied by the conclusionary statement that such procedures will not avail. This is true as a basic tenet. It is doubly true when it becomes eminently apparent that no "normal investigative procedures", in respect to Minnie Kahn, were instituted. Since the prerequisite of overhearing her was ignored, no authorization to listen to her conversations could

possibly have issued. It follows that the expansion of the issued order as a warrant to intrude upon her conversations could not possibly have been within the intended scope.

Alternatively, if "normal investigative methods" were used, and developed no basis upon which to employ the extraordinary investigative method of eavesdropping, no authorization to overhear her conversation could reasonably have been sought. The authorization order, therefore, cannot be expanded to imply that which it could not legally include.

Additionally, all of the government's authorities, so far as they are applicable, support the decision of the Court of Appeals, here being reviewed.

As an addendum, we respectfully submit that the continuing secrecy surrounding the issuance of interception files makes incomplete, or at the least, piecemeal consideration on review, and, thus, reduces its effectiveness. We see no advantage it serves, nor how it advances orderly comprehensive proceedings.